No. 4388.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Karl Emerzian,
Plaintiff in Error,
vs.
S. J. Kornblum and William Kornblum, a Corporation,
Defendant in Error,

BRIEF OF DEFENDANT IN ERROR.

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Brief of Defendant in Error on Writ of Error from the United States District Court for the Southern District of California.

This is an appeal by Karl Emerzian, plaintiff in error and defendant, from a judgment awarded S. J. Kornblum and William Kornblum, a corporation. The action was based upon a contract in writing entered into between the corporation and Emerzian, by which Emerzian agreed to sell and the corporation agreed to buy one hundred cars of Muscat grapes, during the grape season of 1922.

The amended complaint sets forth the contract in writing, which forms the basis of the suit, as follows:

"For and in consideration of the sum of One Dollar in hand paid, the receipt of which is hereby acknowledged, the undersigned agree to the following:

Witnesseth:—

That Karl Emerzian, party of the first part, agrees to sell, and S. J. and William Kornblum, parties of the second part, agree to buy One Hundred cars of Muscat grapes at Fifty dollars per ton, loaded, including lugs, in Refrigerator cars.

Same fruit must be free of rain damage and suitable for Eastern shipment.

Shipment to begin when fruit is well matured.

If Buyer insists on covered lugs, he must pay the expense of same.

Fruit is to be paid for on loading of cars and surrender of Bill of Lading in Fresno.

On or about the fifteenth of August if Seller elects from Buyer to give seller an advance of Five or Ten Thousand Dollars, the Buyer agrees to do so.

In the event of strikes or car shortage beyond the Seller's control, Seller is not responsible for delivery.

S. J. & Wm. Kornblum
By S. J. Kornblum."

[Tr. pp. 9-10.]

The sum of ten thousand dollars was advanced by Kornblum to Emerzian under the contract. The amended complaint further alleges that forty-eight cars of Muscat grapes were delivered by Emerzian and were paid for in full by the corporation in accordance with the contract, and that fifty-two cars of said Muscat grapes were not delivered. [Tr. pp. 6-10.]

The answer denies that there was any failure, refusal or neglect on the part of Emerzian to comply with the contract, but avers that the corporation refused to accept the balance of the fifty-two cars. By a counterclaim plaintiff in error alleges a written modification of the contract,

"whereby plaintiff agreed to accept in full performance of the terms of said contract, on the part of the defendant, the entire product of the Minkler Ranch, the same to be not less than fifteen cars of grapes.

"That the Minkler Ranch described in said modification of said contract was owned by defendant and bore at said time the crop of Muscat grapes which were the grapes described in said original contract." [Tr. p. 13.]

A tender of said fifteen cars of grapes is thereafter alleged and a refusal to accept the same; the counterclaim proceeds as follows:

"That at the time of the refusal of plaintiff so to receive and accept said bills of lading, and at the time that plaintiff so notified defendant that it would not receive any more of said grapes, approximately three hundred tons of grapes were on the said Minkler Ranch,"

and damages are asked by reason of the alleged refusal to accept the grapes.

A cross-complaint alleges a contract for the sale of certain other varieties of grapes with the refusal of plaintiff to accept the same in accordance with the contract and a consequent damage. [Tr. pp. 11 to 17.]

The answer to the counterclaim and cross-complaint denies any modification of the original contract in writing, but alleges that the later writing which was executed relative to the fifteen cars was merely intended as a further assurance of good faith on the part of both parties for the fulfillment of the contract originally entered into. It is denied that defendant tendered any grapes in accordance with the terms of the contract which were refused. The answer to the cross-complaint further denies any contract for the purchase of other varieties of grapes and denies damage. [Tr. pp. 18-24.]

The findings of fact and conclusions of law, prepared in accordance with the opinion of the court, find that the original contract (Plaintiff's Exhibit "A") was executed by the respective parties; that said contract referred exclusively to the 1922 crop; that the sum of ten thousand dollars was deposited with defendant by the corporation and that the sum of four thousand eight hundred dollars ($4800.00) was applied to the purchase of cars actually delivered to plaintiff by defendant, leaving a balance of the deposit in the hands of Emerzian of five thousand two hundred dollars ($5200.00); that forty-eight cars out of the one hundred cars of Muscat grapes were delivered to plaintiff and were accepted and paid for by it; that said cars of grapes averaged fifteen tons or thirty thousand pounds each; that defendant failed, neglected and refused to deliver the remaining fifty-two cars of Muscat grapes to the damage of the plaintiff in the sum of thirteen thousand two hundred sixty dollars ($13,260.00) in addition to the five thousand two hun-

dred dollar ($5200.00) balance of deposit. The findings are further to the effect that no cars of grapes were tendered in accordance with the contract which were not accepted; that plaintiff fully kept and performed all of the terms, covenants and conditions of the agreement on its part to be kept and performed; that seven cars of Muscat grapes were tendered by defendant to plaintiff in October and November, 1922, but that they did not comply with the contract and were decayed and unsuitable and unfit for Eastern shipment; and that at the time of said tender and at all times thereafter defendant was unable to tender or deliver to plaintiff any Muscat grapes in carload lots that were free from rain damage and fit and suitable for Eastern shipment.

The court further finds that the writing executed subsequent to the original contract was not a modification of the original contract. Judgment was therefore ordered and entered in the sum of eighteen thousand four hundred sixty dollars ($18,460.00), together with interest. [Tr. pp. 25-30.]

The Evidence.

We shall review briefly the evidence in the case.

The first witness was Karl Emerzian, defendant and plaintiff in error, who was called for cross-examination under the provisions of section 2055 of the Code of Civil Procedure. He testified that he delivered forty-eight cars out of the one hundred; that the first time Kornblum refused to accept any grapes was October 26th [Tr. p. 35.]; that tenders were made by

him after that date and that he considered such grapes to comply with the contract; that on the 26th of October Kornblum accepted a car. The witness testified further that Kornblum requested the written modification of the contract from him in the Sequoia Hotel in Fresno. [Tr. pp. 38-39.]

S. J. Kornblum testified that he was representing the plaintiff corporation in Fresno, and that he is thoroughly familiar with the grape business; that during the 1922 grape shipping season he constantly demanded of Emerzian that he comply with his contract.

"I demanded grapes every night he came to the lobby of the Sequoia Hotel. I asked him the reason why he didn't give me any grapes that I bought. He said, 'I can't obtain no cars.' I says, 'Why you can get cars to load other stuff.' 'Well,' he says, 'I can get $35.00 or $40.00 a ton more and I can give you your grapes anytime. We have no contract as to dates when I have to give you the grapes.'" [Tr. p. 41.]

After constant refusal on the part of Emerzian to fulfill his contract Emerzian finally told Kornblum on the 18th of October that he wanted to deliver only fifteen carloads more of grapes. The conversation is described between pages 43 and 46 of the transcript. Tenders of grapes made after the 28th of October were not in compliance with the contract because of the rain damage to the grapes; they were not suitable for Eastern shipment. [Tr. pp. 47-49.] The witness testified as to the price of grapes during the season as follows:

September 1st	$40.00	
September 10th,	47.50	
September 20th	65.00	
October 1st,	70.00	
October 15th	82.50	
October 10th,	72.50	to $75.00
October 18th,	90.00	

[Tr. p. 50.]

Kornblum testified that he was forced to purchase other Muscat grapes during the season from $85.00 to $87.50 per ton in order to fulfill outstanding contracts. [Tr. p. 51.] About twenty to twenty-two cars were thus bought. [Tr. p. 55.] The alleged modifying agreements were introduced in evidence and are shown on pages 61 and 62 of the transcript to be as follows:

"S. J. Kornblum
of Brooklyn, N. Y.

(S)
Sequoia Hotel,
E. C. White, Mgr.
Fresno, California.

October 18th, 1922.

I hereby agree to accept on the 100 cars Muscats to be loaded in refergerator as per contrackt up to the present time he K. Emerzian allready delivered 45 cars K. Emerzian to deliver no less than 15 cars more than will make 60 cars instead of 100 cars if Minkler ranch however has more he agrees to deliver all.

S. J. Kornblum
of Brooklyn, N. Y."

(Testimony of S. J. Kornblum):

"(S) Sequoia Hotel,
E. C. White, Mgr.
200 rooms 10/18

I hereby agree to accept on the 100 cars Muscat to be loaded in refrigerators as per contrackt up to present time he K. Emerzian allready delivered 45 car K. Emerzian agrees to deliver 15 more cars anyhow Or if there is more on Minkler Ranch, Camp Six, he must give to me or deliver.

S. J. KORNBLUM
K. EMERZIAN."

The market on Muscat grapes began to break on the 23rd of October. [Tr. p. 63.] One car of grapes was accepted by him on the 26th of October. "On the 26th the market price was $40.00, maybe $50.00.)" [Tr. p. 65.]

WALTER BONNETT of the United States Weather Bureau testified that a heavy rain fell in this territory on the 27th of October, there being 51/100 of an inch precipitation. [Tr. pp. 67-69.]

F. M. WITHERS, in the fruit and produce business, who handled between 175 and 225 cars of grapes in 1922, testified that Muscats were generally damaged by the rain of October 27th, and that in his opinion no Muscat grapes were suitable for Eastern shipment after the rain. The witness testified that the prices of Muscat grapes were as follows:

"From September 1st to October 1st the price of grapes climbed from $37.50 to $65.00 a ton; from October 1st until October 18th the price kept climbing until it was $85.00 a ton at the latter date. The market dropped on the 23rd of October." [Tr. pp. 69-71.]

M. M. BAKALIAN was engaged in grape shipping in 1922. He examined certain grapes of Emerzian after the rains and found them unfit for shipment. [Tr. pp. 71 to 72.]

H. SAKAJIAN, who qualified as a grape expert, also testified as to the poor condition of Emerzian's grapes after the rain. [Tr. pp. 72 to 75.]

E. Y. FOLEY, an experienced grape shipper, testified that the market prices of Muscats during 1922 were as follows:

August 25th,	$52.50
August 27th,	60.00
August 29th,	62.50
September 1st to 25th	62.50
September 25th to October 3rd,	72.50 to $80.00
October 3rd to 6th,	85.00

On the 13th of October the witness sold a car of Muscats at $100.00 per ton. On October 2nd Mr. Kornblum bought from the witness five cars of grapes at $82.50 a ton. Muscat grapes are very susceptible to rain damage and after October 27th, 1922, the witness had doubts as to whether any of the Muscats would carry in good condition to Eastern markets, "for they were soft occasioned by the rain." "I didn't see any grapes after October 27th that were free from rain damage." [Tr. pp. 75 to 78.]

KARL EMERZIAN was called for further cross-examination and thereupon the plaintiff's case was closed. [Tr. pp. 78-79.]

SAMUEL J. KORNBLUM was then called by the defendant under section 2055 and repeated his statements that Emerzian had frequently told him that he would not deliver to him early in the season because the contract did not call for any specific dates for delivery. [Tr. pp. 84 to 87.]

KARL EMERZIAN was thereupon called as a witness on his behalf. He testified relative to the written modification of the agreement, as to his alleged tender of grapes, and as to the matters covered by his cross-complaint. The witness further testified:

"Notwithstanding, Kornblum had seventy cars of Muscats coming under his contract, on October 5th he entered into a contract with me to take additional cars of Muscats at $80.00 a ton. He told me if I can get more he will buy them. I was going to give him all I had and did give him all I could get cars for. He asked me if I could get more Muscats at $80.00 than the contract, he will buy them. At that time my brother's grapes were on the trays, all of them. At that time Mr. Kornblum breached his contract, I had 500 tons of Muscat grapes that I could deliver him. I kept them for my contract." [Tr. p. 92.]

"When I first entered into the contract I took him all around to these different vineyards and finally went out to the Minkler Ranch and to Camp Five and said, 'Now Emerzian Brothers own this other place but this is mine and I am going to give you the grapes right from here', and we agreed upon it then, that all the grapes he was going to get were to come from Camp Five and from the Tagus ranch 100 tons, that means about 6 or 7 or 8 cars. I completed my contract with him as far as the Tagus ranch was concerned. It was

the distinct understanding with him that the balance of the grapes were to come from Camp Five, Minkler ranch." [Tr. p. 94.]

When discussing the alleged modification of the contract Emerzian claims that time and time again he stated to Kornblum that he would give Kornblum fifteen cars "and all I got on the Minkler ranch."

PETER MALJAN was the broker in the transaction and testified that the cars tendered by Emerzian and refused by Kornblum after the rains were sold at a loss. The schedule of car shipments was introduced in connection with this testimony, [Tr. pp. 95 to 99, lines 18 and 19, p. 8.]

V. TARJANIAN testified to the effect that the rains of the 27th of October did not very badly injure the Muscats. [Tr. pp. 101-102.]

C. TARZARIAN testified that the Muscats were not injured by the rain. [Tr. pp. 102-103.]

J. H. BARKER [Tr. pp. 103-105] and GEO. HENSLEY Tr. pp. 105-106], testified that there were still Muscat grapes available for manufacturing purposes after the rains of October. The testimony closed after short re-examinations of Emerzian and Kornblum.

From this brief review of the testimony it will be seen that upon several important points there was a sharp conflict in the evidence; the trial court adopted the view of the principal facts taken by plaintiff.

I. Several Arguments of Plaintiff in Error Are Without Substantial Merit.

The chief alleged errors relied on by plaintiff in error are those centering about the computation of damages. It is contended that erroneously "evidence was admitted and acted upon by the court in its judgment showing the price of grapes described in the contract throughout the season." It is further assigned as error that the court in its computation of damages did not include a period in which "no price was obtainable for grapes." The point is also made that the court was wrong in its finding that the second instrument signed by the parties did not, as a matter of law, modify the original agreement. These are the principal arguments advanced by plaintiff in error; but there are a number of minor points which we desire to dispose of before considering the principal arguments.

Objection is made to the fact that the court, acting within its discretion, refused to permit the amendment of defendant's pleadings in the midst of the trial, so as to set forth an alleged car shortage as an excuse for non-performance. Defendant pleaded in his answer that at all times he stood ready, able and willing to perform and make delivery. This amendment, during the trial, would have constituted a complete departure from the theory which had formed the basis of the defense; the answer and counterclaim had alleged a tender upon the part of the defendant, and there had been no claim whatsoever that defendant's failure to deliver the remaining cars was due to a car shortage.

Hence plaintiff went to trial solely upon the affirmative issue of performance and no notice of any issue of car shortage, and as a result, therefore, no preparation was made for such issue. This matter was, of course, wholly within the sound discretion of the court, and we submit that there was no abuse of discretion under the circumstances shown by the ruling.

Manha v. Union Fertilizer Co., 151 Cal. 581;
Salmon v. Rathjens, 152 Cal. 290;
Allen v. Los Molinos Land Co., 25 Cal. App. 206, 213.

This also disposes of number 8 under "errors relied on" in the brief of the plaintiff in error, which is as follows:

"A sufficient car supply was a condition precedent to a liability on the part of defendant."

If defendant relied upon a shortage of cars as an excuse for non-performance he should have pleaded the alleged facts as a positive defense. The pleadings were conclusive to the effect that there was no car shortage, and defendant relied solely upon a tender as a defense. Since there was no pleading of a car shortage, plaintiff in error is foreclosed upon this asserted error and especially can not rely upon this point on appeal.

Eucalyptus Growers' Association v. Orange etc. Company, 174 Cal. 330;
Peek v. Steinberg, 163 Cal. 127;
Bartlett Springs Company v. Standard Box Co., 16 Cal. App. 671, 675;
Civil Code, Sections 1511, 1512, 1514;
6 Cal. Juris., 449.

It is also claimed that the court erred in permitting S. J. Kornblum to testify as to conversations which he and Emerzian had at the time of the signing of the alleged modification of the original contract. As the court stated at the time the objection was made:

"Anything that occurred between the parties by way of a dispute or a claim for failure and a denial of delivery and all of those things must be ventilated here in order to get at the facts of this controversy. Grapes are admitted not to have been delivered in full performance of the contract and the question is why, and I suppose the only way to get at it is to find out what happened between them during that time." [Tr. p. 42.]

There was a direct issue formed by the pleadings as to whether the writings signed subsequently to the execution of the original contract were indeed a modification of the original agreement, or whether they were merely further assurances of performance on the part of the defendant. In order to determine this issue, the court necessarily had to acquaint itself concerning the facts and circumstances surrounding the signing of these latter instruments.

Code Civil Procedure, Section 1860;
Civil Code, Section 1647;
6 Cal. Juris, 294.

Objection is made to the admission of certain testimony on the part of Mr. Kornblum that he went into the open market and bought grapes to supply his own contracts, after the failure of defendant Emerzian to deliver to him. In support of his position, plaintiff in

error cites *Fairchild v. Southern etc. Co.,* 158 Cal. 264, 271. That case merely holds that the specific prices paid for articles necessary to replace other articles which a contracting party had failed to deliver, was not the proper measure of damages. In this case, the evidence was not admitted to prove damages, but only to show the facts surrounding the execution of the later instruments, and to cast light on Emerzian's testimony that Kornblum had importuned him to sign the second instrument which cut down the number of cars deliverable under the contract.

Plaintiff in error also complains of the admission of evidence to the effect that Kornblum had outstanding contracts for the resale of grapes in the East, and cites *Cole v. Swanston,* 1 Cal. 51. That case establishes the rule that there can be no recovery of prospective resale profits without special pleading to that effect. In the present case, the damages are not based upon the loss of prospective resale profits. The court specifically stated that this testimony was not admitted for the purpose of establishing damages, but restricted same solely to the circumstances surrounding the claimed modification. [Tr. p. 54.]

It is also objected that the court did not permit an answer to a question in the cross-examination of Mr. Kornblum, which was as follows:

"Q. To whom else other than to Charles Emerzian, the nephew, did you tell that this contract had been extorted from you?"

We submit that an answer to this question would have been wholly incompetent, irrelevant and imma-

terial, and that the court was correct in sustaining the objection. Its lack of mutuality is especially emphasized in view of the fact that the claimed modification of the agreement had no consideration therefor, and was wholly unperformed, and hence had no bearing under the evidence upon the real issue.

Thus, the only substantial points made by plaintiff in error on this appeal are the following:

1. Was the court in error in fixing the damages?

2. Was the court in error in holding that the alleged "modifying agreement" did not in fact modify the original contract?

We shall discuss these questions in the order mentioned.

II. The Court Properly Determined the Amount of Damages.

The learned District Judge stated in his opinion:

"The rule of damages is, I think, clearly stated by plaintiff's counsel to be that expressed in sections 3308 and 3309 of the Civil Code of California (see also Vol. 24, Ruling Case Law, page 72, on general subject); that is, damages would be the excess of the value of the grapes to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled." [Tr. p. 115.]

It thus becomes a matter of great moment to determine the exact meaning of the original contract of sale, so that it can be determined when the breach took place. The trial court, as is shown by the opinion, took the view that at the time of the execution of

the contract, the parties contemplated that the grape season would end as soon as heavy rains fell; that in order to deliver the one hundred cars of Muscat grapes, it was seller's duty to so distribute his delivery of cars over the entire grape season as to complete his contract within the period limited by natural conditions. In this connection, it should be noted that under the terms of the contract, shipments were to begin "when fruit is well matured."

To contend, as plaintiff in error does in his brief, that he could wait until the grape season was terminated by natural conditions, and that the breach did not occur until a day or two before the end of the season when the price of grapes had fallen, and that there was no breach during the time earlier in the season when the price of grapes was higher, is to contend for the patently unfair and unreasonable. In view of the payment of ten thousand dollars as a deposit by plaintiff at the commencement of the season and in view of other circumstances of the case, it might well be contended that plaintiff was entitled to the highest market value of Muscat grapes during the entire season.

Dabovich v. Emeric, 12 Cal. 171;
Mahart v. Riley, 17 Cal. 415;
Benjamin on Sales, Bennett's Am. Ed., note p. 861;
1 Sedgwick on Damages, p. 264.

The learned trial judge, however, adopted perhaps a more fair and equitable view of the matter. In his opinion he stated:

"I think that under a contract of the kind here considered where deliveries were to be made from day to day covering a fruit season, the value to the buyer would not be expressed by the high price that might have been obtained for a single car of fruit during the period, but that an average price should be adopted. The cars contained an average each of fifteen tons. The fifty-two cars as to which the defendant was short in his deliveries would have contained seven hundred eighty tons. The difference between the price agreed to be paid, to-wit, $50 per ton, and the average price of $67, would be $17. The loss to the plaintiff, therefore, being $17 per ton, the total amount would be $13,260."

As we have heretofore pointed out, the contract provides that delivery was to begin when the grapes matured. The evidence discloses that defendant had an abundance of grapes, sufficient to make full performance of his contract, during the entire season, and that he sold quantities of these grapes to other persons at a higher price than he was to receive from plaintiff under the contract. The fault was entirely his in not performing under his contract when he had the grapes in sufficient quantities and in proper condition to do so. He had no right, under the agreement, to take chances on the occurrence of rain or of any other contingency. In the case of *Bill v. Fuller,* 146 Cal. 50, a defendant bought oranges on the trees and permitted them to remain thereon until they became "ripe and unfit for market." The fault being that of the purchaser, the California Supreme Court held that he must bear the loss. In this case, the fault was that of the seller in

permitting the grapes to remain on the vines for such a period of time that they became unfit for shipment, and the seller must bear the consequent loss. The contract provided for delivery when grapes were well matured. Obviously when under the contract it was provided that delivery should begin when fruit is well matured, coupled with the obligation of plaintiff in error to make deliveries during the season, and with the plaintiff's pleading that he was at all times ready, able and willing to make delivery, it does not lie in the plaintiff in error's mouth to say that he could sell the grapes to other buyers when the market was above the contract price of defendant in error and thus to his advantage, sell elsewhere, speculate upon the day of delivery, without imposing upon him the resulting loss to the plaintiff in error. By his neglect and failure to perform when he could perform, he must be liable for failure of performance when his grapes, otherwise sound, became ruined by rain damage. Plaintiff in error refused to make further deliveries on, to-wit, October 18, or, at most, October 23, when admittedly the season closed, because admittedly by the terms of the contract performance thereafter was impossible, and we submit that the trial court rightfully used this latter date as the date of the breach and the basis in the calculation of the damages. As said in Grant v. Warren, 31 Cal. App. 459,

> "The law holds him to the measure of damages which he himself prescribed."

Plaintiff in error urges that in fixing upon a fair average price, certain testimony relative to the market

for Muscats during the last few days of the season was not taken into consideration. The court, on the other hand, did not consider the testimony of the witness Foley that at one period during the season the price had reached $100 per ton, or the testimony of the witness Kornblum that about the middle of October the price per ton was over $90. From a consideration of the testimony the court reached the conclusion that $67 was the fair average price of a ton of Muscat grapes and based the calculations thereon; it surely can not be said that there is not ample evidence to support this position.

The California courts have expressly approved the method of striking an average in cases of this general nature for ascertaining damages.

Northern Light Co. v. Blue Goose Co., 25 Cal. App. 282, 293;
Grant v. Warren, 31 Cal. App. 453.

In the Northern Light Co. case, the court says:

> "But it is the doctrine of common justice, as well as of the authorities, that, since the difficulty of ascertaining *exactly* how much plaintiff was injured arose from defendant's breach of its contract, scant attention will be paid to its complaint that greater accuracy was not obtainable."

C. C. Sec. 3308-3309;
24 R. C. L. p. 72;
Shoemaker v. Acker, 116 Cal. 244;
8 Cal. Jur. 756.

To sum up this matter, a fair construction of the contract would indicate that deliveries were to com-

mence when the grapes were well matured, were to be continuous thereafter, and were to be completed before natural contingencies put an end to the 1922 grape shipping season. Emerzian had approximately three months within which to complete deliveries; he failed to complete his contract; and the fairest method of ascertaining the damages was that adopted by the court. We submit that the amount of damages was fairly computed.

III. The Court's Finding That the Original Agreement Was Not Modified Is Correct as a Matter of Law.

In the first place, there was no consideration for the so-called modification. The attempted modification was only that defendant should deliver fifteen cars instead of the fifty-five cars that plaintiff was entitled to. There was no advantage and no benefit to plaintiff, but on the other hand it was deprived of the profits from a resale of the grapes to which it was entitled. The very terms of the alleged modification lend themselves to no other construction.

The law clearly holds that a modification of a contract must be supported by a sufficient new or additional consideration. A consideration covered by the original contract will not support, or constitute a consideration for, a modification thereof. The general rule is thus stated in 6 California Jurisprudence, at page 179:

> "Neither the promise to do nor the actual doing of that which the promisor is by law, or subsisting

contract, bound to do, is a sufficient consideration to support a promise made to the person upon whom the legal liability rests, either to induce him to perform what he is bound to do, or to make a promise so to do."

This rule is supported universally by the California authorities.

Scheeline v. Moshier, 172 Cal. 565;
Marinovich v. Kilburn, 153 Cal. 638;
Gordon v. Green, 51 Cal. App. 765;
Mackenzie v. Hodgkin, 126 Cal. 591;
Sullivan v. Sullivan, 99 Cal. 187;
Sidell v. Clark, 89 Cal. 321;
Deland v. Hiett, 27 Cal. 611;
Jordan v. Scott, 38 Cal. App. 739;
Pac. Ry. v. Carr, 29 Cal. App. 722;
Benedict v. Greer-Robbins, 26 Cal. App. 468;
Poetker v. Lowry, 25 Cal. App. 616;
Ellison v. Jackson Water Co., 12 Cal. App. 542;
Main St. Ry. Co. v. L. A. Traction Co., 129 Cal. 301;
Carter v. Rhodes, 135 Cal. 46;
Hibernian etc. Soc. v. Walkenruder, 111 Cal. 471;
Lassing v. Page, 51 Cal. 575;
6 R. C. L. 916;
8 Cyc. 535.

It is suggested in the brief of plaintiff in error that there was additional consideration in the new writing in that the term "subject to car shortage" was not inserted. But in order to excuse performance of a con-

tract, car shortage would have had to be pleaded affirmatively and proved as an excuse for non-performance. This suggested car shortage never became a reality, as shown by the pleadings, and defendant's claimed ability to perform would render nugatory any possible advantage due to any such modification.

Secondly, the authorities are equally clear to the effect that when a modifying agreement is not performed, the modification has no effect. It would be a singular principle indeed that would accord to defendant any advantage upon a modification of a contract when concededly there was no performance under the modification. This proposition is clearly enunciated in *Benedict v. Greer-Robbins,* 26 Cal. App. 468, where the court had before it a modification of a contract by which time for payments was extended upon an automobile sales contract. There had been a default in payments and a suit was instituted in claim and delivery; the court says on page 471 of the opinion:

> "Under the evidence in this case, even conceding validity to the agreement as to the extension of time, it is plain that appellant did not live up to the conditions of that understanding. He did not send in the fifty dollars required of him on July 10th, until July 19th, which was a delay of more than one week. This fact alone would have authorized respondent to have treated the agreement for extension as being abrogated and to insist upon taking advantage of appellant's default which had already continued for more than two months."

In 8 Cyc. 535, the general rule is stated as follows:

> "Upon the breach of the terms of a compromise agreement, or abandonment by one party thereto, the other party may treat the agreement as a nullity and be admitted to his original claim or cause of action."
>
> *Scheeline v. Moshier,* 172 Cal. 571.

Under the facts in the case at bar, there was no benefit to buyer under the alleged modification, and no consideration given therefor. We submit that the so-called modification had no validity whatsoever; that the original contract was not affected thereby, and that the findings of the District Court are correct.

Conclusion.

In conclusion, we submit that the evidence amply justifies the judgment, and that there are no errors in the record.

Respectfully submitted,

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